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DECISION



H. Lambert
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-189645

DATE: December 21, 1977

MATTER OF: Immigration and Naturalization Service
Pilots-Hazardous Duty Pay

DIGEST: Pilots performed about 4 hours of low level, low speed flight duty with responsibility for making patrols, each workday. Although such hazard is recognized in GS-12 position classification, it is not a factor in classification of GS-9 and GS-11 positions. GS-9 and GS-11 pilots who perform such duty on regular and recurring basis may not be paid hazardous duty differential since 5 U.S.C. § 5545(d) permits payment of differential only for irregular or intermittent exposure to hazard.

By a letter dated July 15, 1977, Mr. Stanley E. McKinley, Associate Commissioner for Management of the Immigration and Naturalization Service (I&NS), Department of Justice, requested our decision concerning the propriety of paying a hazardous duty differential to certain airplane and helicopter pilots employed by that agency.

Mr. McKinley states that I&NS employs pilots at grade levels GS-9, GS-11, and GS-12, drawing its recruits at the GS-9 level from the ranks of its trained and experienced Border Patrol Agents. These pilots perform flight operations for about 4 hours each workday at altitudes below 200 feet over barren country at speeds just above the stall speed of the aircraft. The purpose of these flights is to spot and follow the tracks of smugglers and other persons crossing the border illegally.

Under classification standards promulgated by the Civil Service Commission, pilots of airplanes and helicopters are placed in the GS-2181 series. In classifying the series into grade levels, the degree of hazard involved in the assignment constitutes one of the three classification criteria. The specific hazard of low

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altitude, low speed tracking flights is recognized only at the GS-12 level, and is a primary basis for distinguishing GS-12 work from the lower grades. Duties involving such a substantial degree of hazard are not recognized in the appropriate classification standards for the GS-9 and GS-11 levels.

Because the Civil Service Commission classification standards do not contemplate the substantial hazard performed by I&NS pilots at the grade GS-9 and GS-11 levels, the issue arises whether employees at those levels may receive a hazardous duty differential when they perform such duties. Mr. McKinley states that the Western Region of I&NS has been paying the differential to GS-9 and GS-11 pilots, while the Southern Region has not. In that regard, Mr. McKinley notes that the pilots perform the required hazardous duties on a "regular and recurring basis." Accordingly, our decision has been requested as to whether the hazardous duty differential may properly be paid in the above circumstances.

Statutory authority for the payment of a hazardous duty differential is found at 5 U.S.C. § 5545(d), which provides as follows:

"(d) The Commission shall establish a schedule or schedules of pay differentials for irregular or intermittent duty involving unusual physical hardship or hazard. Under such regulations as the Commission may prescribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential--

"(1) does not apply to an employee in a position the classification of which takes into account the degrees of physical

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hardship or hazard involved in the performance of the duties thereof;
and

"(2) may not exceed an amount equal to 25 percent of the rate of basic pay applicable to the employee."

The legislative history to H.R. 1535, Eighty-ninth Congress, which became 5 U.S.C. § 5545(d) indicates that the differential was not intended to be paid where the hazard recurs regularly or is inherent in a position. Thus, House Report No. 31, 89th Cong., 1st Sess., states at page 2:

"Extra compensation may be provided Classification Act employees through the regular position classification process when the unusual physical hardship or hazard is inherent in the position, when it regularly recurs, and when it is performed for a substantial part of the working time.* * *"

Accordingly, we have felt constrained to hold that under the statute, a pay differential is authorized only for irregular and intermittent duty involving physical hardship or hazard, and then only if those factors were not used as a basis for classifying the position. B-177580, August 21, 1973. In that case, the employees concerned performed quality control duties to assure that ammunition items accepted for the Government met all contractual requirements. Since employees were exposed to explosive materials on a daily basis as the normal duties of their positions, the hazardous duty which they performed was not irregular or intermittent, and payment of a hazardous duty differential was denied.

Nor can the implementing regulation prescribed by the Civil Service Commission require a contrary result. That regulation is found at 5 C.F.R. § 550.904 and provides as follows:

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"(a) An agency shall pay the hazard pay differential listed in Appendix A to an employee who is assigned to and performs any irregular or intermittent duty specified in the appendix when that duty is not usually involved in carrying out the duties of his position. Hazard pay differential may not be paid an employee when the hazardous duty has been taken into account in the classification of his position.

"(b) For the purpose of this section:

"(1) 'Not usually involved in carrying out the duties of his position' means that even though the hazardous duty may be embraced within the employee's position description it is not performed with sufficient regularity to constitute an element in fixing the grade of the position.

"(2) 'Has been taken into account in the classification of his position' means that the duty constitutes an element used in establishing the grade of the position."

While the regulation contemplates that hazardous duty performed on a regular basis be considered a factor in classifying the position, it does not authorize payment of the differential for hazardous duty performed with regularity, where such duty is not a factor in the classification of a particular employee's position. In view of the clear statutory mandate and the legislative intention that the differential be paid only where the employee is exposed to the hazard on an irregular or intermittent basis, the differential authorized by 5 U.S.C. § 5545(d) may not be paid in connection with a hazard encountered on other than an irregular or intermittent basis. Thus, where an employee in fact performs hazardous duty on a recurring and substantial basis, the differential cannot be paid, and the matter is properly for consideration

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by the Civil Service Commission in connection with proper classification of the position. B-177580, supra.

In the present case, pilots employed by I&NS perform low altitude, low speed tracking flights for about 4 hours each workday. Since this specific hazard is recognized in classifying pilots at the GS-12 level, such employees may not receive hazard pay. Although that particular degree of hazard is not a factor in classifying pilot positions at the GS-9 and GS-11 levels, the record indicates that such pilots perform hazardous duty for approximately one-half of their total tours of duty. We must, therefore, conclude that such hazardous duty is not performed on an irregular or intermittent basis. Accordingly, under 5 U.S.C. § 5545(d) the employees are not entitled to payment of a hazardous duty differential. As noted above, the matter may be referred to the Civil Service Commission for its consideration of the appropriate classification of these positions giving due weight to the hazard factors presented.

Regarding employees to whom payment of a hazardous duty differential has already been made, Mr. McKinley has inquired as to the procedure to be followed in requesting waiver of their obligation to refund the erroneous payments. Standards for waiver of claims by the United States against employers for erroneous payments of pay and allowances are set forth at subchapter G, chapter 1, title 4, Code of Federal Regulations. Section 92.2, title 4, Code of Federal Regulations sets forth the requirements for the investigation of the erroneous payment. If the amount of overpayment to an individual exceeds \$500, the report of investigation, together with the recommendation of the agency head, should be referred to this Office for determination.

Deputy


Comptroller General
of the United States